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92-55

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FEDERAL PACIFIC ELECTRIC COMPANY,

Petitioner,

v.

CLARK NEWTON AND JOYCE NEWTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

After the jury had been passed for cause, and after the parties had exercised their peremptory challenges, the trial court seated six regular jurors and one alternate juror. Later, after the close of all evidence, the trial court excused one of the regular jurors as the alternate, as the plaintiffs requested, and substituted the alternate juror as a regular juror. The trial court did this without making any finding on the record that the regular juror was unable or disqualified. Did this violate 28 U.S.C. § 1870 and Rule 47, Fed. R. Civ. P.?

RULE 29.1 STATEMENT OF RELATED PARTIES

This brief is filed on behalf of Federal Pacific Electric Company. Its parent company is Reliance Electric Company.

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CLARK NEWTON AND JOYCE NEWTON,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Federal Pacific Electric Company, defendant below, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit (District Judge Hunter with Circuit Judges Moore and Brorby), which affirmed a judgment below for plaintiffs Clark and Joyce Newton based on a jury verdict.

OPINIONS BELOW

The opinion delivered in the Court of Appeals below is not reported; it was pronounced on April 6, 1992 in

case numbers 91-6174 and 91-6276. Federal Pacific Electric Company petitioned the Court of Appeals for rehearing and that petition was denied in an order not reported; that order was pronounced on May 22, 1992 in case numbers 91-6174 and 91-6276.

JURISDICTION

The judgment of the Court of Appeals was dated and entered April 6, 1992. Petitioner's timely petition for rehearing was denied by the Court of Appeals on May 22, 1992. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

28 U.S.C. § 1870; Rule 47, Fed. R. Civ. P.; Rule 201, Fed. R. Evid.

STATEMENT OF THE CASE

A. The Trial Court Proceedings

This was a personal injury action based on a theory of manufacturer's products liability. Jurisdiction in the court of first instance was founded upon diversity of citizenship and amount in controversy under 28 U.S.C. § 1332 because the matter in controversy exceeded the sum of $50,000, exclusive of interest and costs, and

because all plaintiffs were citizens of states different from all defendants.

This case was tried during January, 1991. At the outset of the case, the trial court called 13 jurors to the jury box and then proceeded to conduct voir dire examination. All parties passed the jury for cause and then the court allowed the plaintiffs three peremptory challenges and the defendants three peremptory challenges. This left seven qualified jurors, and the trial court, on the record but out of the jury's hearing, designated Nancy Ketcham, who was the last juror called, as the alternate juror. The trial court stated:

> "Gentlemen, this will be the alternate juror (Court pointing to the card of Juror Ketcham) unless at the end of the case, the parties agree to substitute another juror as the alternate or unless the Court determines that another should be substituted as the alternate." (Reporter's Transcript of Voir Dire, p. 15.)

The case then proceeded to trial, and after the close of evidence, after closing arguments, and after the trial court had instructed the jury, the trial court called the attorneys to the bench and asked them to submit cards with the name of the juror they would like to see designated as the alternate juror in order to determine if the parties wished to substitute another juror as the alternate juror by agreement. This was done by "secret ballot" with the parties to submit their choice for the alternate on pieces of paper to the trial court.

Petitioner Federal Pacific Electric Company (defendant below) submitted a card with the name of Marjorie Hamp. The trial court then proceeded to excuse Cynthia

Johnson as the alternate juror. As petitioner was later to learn, the card submitted by respondents Clark and Joyce Newton (Plaintiffs below) did ask that Cynthia Johnson be excused. The trial court made no finding that Juror Johnson was unable or disqualified to serve at that time or at any other time on the record. Moreover, the trial court did not inform counsel of what he was about to do, nor did he provide his reasoning or rationale. The entire process, quoted in full below, happened over a matter of seconds:

> "The Court: Do you both agree to the verdict forms? Are the verdict forms satisfactory?
>
> Mr. Niemeyer: No objection.
>
> Mr. Rupert: No objection.
>
> Mr. Love: No objection.
>
> The Court: Let me have your slips with regard to the alternate juror.
>
> (Counsel hand the Court a piece of paper with the name of their request for the alternate juror. Following which:)
>
> The Court: I am going to excuse her.[1]
>
> (Proceedings resume within the hearing of the jury:)
>
> The Court: Would the bailiff stand and be sworn.

---

[1] Note the trial court's use of the word "her," given that the parties had submitted slips designated the names of different female jurors and given that the originally designated alternate juror, Nancy Ketcham, was a woman.

(Whereupon, Bailiff is sworn:)

The Court: Ladies and gentlemen of the jury, I'll pass a copy of my instructions, together with two verdict forms. My bailiff will hand them to one of you at random as you go down to begin your deliberations, just as you go into the jury deliberation room. Then you may select your foreperson. Whoever is foreperson, will then take charge of the instructions and the verdict forms.

Cynthia Johnson, you are the alternate juror in this case, so if you will remain in the courtroom until after the other jurors begin their deliberations, I'll excuse you at that time.

(Transcript, Vol. IV, pp. 844-45.)

Ms. Johnson had been the first juror selected. She was the only college graduate on the jury and her degree was in engineering. (Trans. of Voir Dire, pp. 7-10.) This case involved extremely complex engineering issues; the product in issue was a large electrical substation. The trial court never announced on the record that he found Juror Johnson to be unable or disqualified. The trial court never stated on the record any justification or rationale for his decision.

B. The Court of Appeals Decision

The Court of Appeals stated at page 6 of its Order and Judgment that the trial court observed that Juror Johnson was at times inattentive and sleeping. However, at no time during the trial did the trial court state on the record that he believed that Juror Johnson was inattentive or sleeping. Similarly, at no time during the trial did any attorney, party or anyone else state that they believed that Juror Johnson was sleeping.

The Court of Appeals then states at page 6 of its Order and Judgment that the trial court redesignated Juror Johnson as the alternate juror based on her inattentiveness during argument. No such finding appears anywhere on the record.

Finally, the Court of Appeals states at pages 6-7 of the Order and Judgment that the trial court could take judicial notice of the conduct of Juror Johnson. However, at no time during the trial did the trial judge ever state that he was taking judicial notice of any conduct of Juror Johnson.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Effectively Permitted Respondents (Plaintiffs Below) A Fourth Peremptory Juror Challenge In Violation of 28 U.S.C. § 1870 And Rule 47, Fed. R. Civ. P.

28 U.S.C. § 1870 only permits a party in a civil case to have three peremptory challenges. Once those peremptory challenges have been exercised, Rule 47, Fed. R. Civ.

P. does not permit the trial judge, or the plaintiff's attorney, to pick and choose who shall serve as the alternate. Thus, Rule 47 provides that the alternate would be the last juror selected:

> "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be. unable or disqualified to perform their duties." Rule 47, Fed. R. Civ. P.[2]

Pursuant to this rule, the trial court, at the outset of the trial, designated the last juror called (Nancy Ketcham) as the alternate juror. However, as the above quote from Rule 47 shows, jurors, once selected, cannot be replaced unless they are "unable or disqualified to perform their duties." The trial court's excusal of Juror Johnson, an engineer and the only college graduate on the jury, at the plaintiffs' request, without any finding on the record regarding her ability or qualification to serve, violated Rule 47. This effectively gave the respondents a fourth peremptory challenge. This resulted in fundamentally unequal treatment of the parties. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 269, 44 L.Ed.2d 141 (1975) (it is error for a court to "pick and choose" among parties).

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[2] This is the language of Rule 47 in effect at the time of this January, 1991 trial. Rule 47 has since been amended.

II. The Court Of Appeals For The Tenth Circuit Has Become By This Decision The Only Circuit Court of Appeals To Allow The Excusal Of A Juror With No Finding In The Record Of The Basis For That Excusal.

Federal Pacific Electric Company does not challenge the Court of Appeals holding that a juror who has been sleeping during trial can be excused. As petitioner argued in its brief below, while this is the law, petitioner does not believe that Juror Johnson was sleeping and no one during the trial asserted on the record that Juror Johnson was sleeping. Petitioner seeks review because nowhere on the record was any finding (or suggestion) made that Juror Johnson was sleeping. Thus, no basis for excusal appears in the record, and petitioner was given no notice of the basis for the excusal and therefore had no opportunity to be heard on the issue. No other Circuit Court of Appeals has held that a juror may be excused with no finding in the record for the reason.

This issue arose in *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983), under Rule 24(c), Fed. R. Crim. P., which contained language identical to Rule 47, Fed. R. Civ. P., with regard to the excusal of a juror. In *Barrett* the Court of Appeals stated that the issue of whether or not a juror had been sleeping and therefore should be excused should be resolved by a hearing:

> "We nevertheless hold that in failing to conduct a hearing or make any investigation into the 'sleeping'-juror question, the trial judge abused his considerable discretion in this area. The case is remanded with instructions that the trial judge conduct a hearing to determine

> whether the juror in fact was sleeping during trial and, if so, whether the juror's being asleep prejudiced Barrett to the extent that he did not receive a fair trial." *United States v. Barrett*, 703 F.2d at 1083.

Similarly, the Court of Appeals for the Fifth Circuit has stated that there must appear some "sound basis" upon which the trial judge exercises his discretion to discharge a juror. *United States v. Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978). Thus, the Court of Appeals of the Fifth Circuit noted that it would be improper for the trial court to discharge a juror "for want of any factual support." *United States v. Rodriguez*, 573 F.2d at 332.

The above-quoted language from the *Rodriguez* case requiring a "sound basis" and "factual support" to excuse a juror was quoted with approval by the Court of Appeals for the Eleventh Circuit in *Green v. Zant*, 715 F.2d 551, 555 (11th Cir. 1983).

Petitioner knows of no Circuit Court of Appeals which permits the excusal of a juror with no finding in the record of the basis.

Finally, the Court of Appeals below suggested that the trial court could have taken judicial notice that Juror Johnson was sleeping.[3]

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[3] This suggestion comes from outside the trial record in two instances. First, respondents' *ex parte* communication to the trial judge below requesting the excusal of Juror Johnson made this suggestion, although this was not revealed to petitioner at the time. Second, in his order denying petitioner's motion for new trial, the trial judge stated for the first time that

(Continued on following page)

In *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983), the Court of Appeals rejected the notion that the issue of whether or not a juror was sleeping could be resolved by judicial notice. The court stated:

> "We do not believe, however, that under the particular circumstances of this case, the trial judge could properly take judicial notice of the fact that 'there was no juror asleep during this trial' without making further inquiry into the matter." *United States v. Barrett*, 703 F.2d at 1083.

Thus, the Court in *Barrett* ordered a hearing on the sleeping-juror issue.

Here, the Court of Appeals only suggested judicial notice as a possible basis for the trial court's decision. At no time did the trial court ever announce that it was taking judicial notice of Juror Johnson's behavior. This shows a more fundamental flaw in the Court of Appeals' reasoning: a court cannot silently take judicial notice of a fact and act thereon without disclosing this to the parties. Thus, Rule 201, Fed. R. Evid., permits a party to "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Here, no such opportunity was ever afforded to petitioner because the trial court never announced that it was taking judicial notice (in fact, the first such suggestion was made not by the trial court but by the Court of Appeals).

(Continued from previous page)

he believed Juror Johnson had been sleeping. This order was entered weeks after the trial had been concluded and the jury had been discharged. Thus, nowhere on the trial record is any basis for the trial court's decision ever stated.

Even more fundamental error is evident in the Court of Appeals' attempt to rely on judicial notice. Rule 201, Fed. R. Evid., only acts to permit judicial notice of matters that occur or arise *outside the courtroom* so as to eliminate the need to bring into the courtroom proof of such matters. Thus, the only matters on which judicial notice is permitted are those that are: (i) "generally known within the territorial jurisdiction of the trial court," or (ii) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), Fed. R. Evid. Here, it is clear that whether or not juror Johnson was alert or sleeping was not "generally known within the territorial jurisdiction," nor was there some outside "source" that would permit an accurate and ready determination of this issue. Rather, the issue concerned an event that occurred inside the courtroom and thus a record was required. However, neither the trial court nor respondents' counsel ever asserted on the record a belief that Juror Johnson was sleeping. In fact, immediately after excusing Juror Johnson, the trial court asked her to stay and meet with the court and the attorneys to discuss her views of the case. The trial court stated:

> The Court: Ms. Johnson, I want to thank you for your willingness to serve as a juror in this case. You are now excused, because we have six jurors to try the case.
>
> As I say, you are now free to discuss it; you are under no obligation. I would like for you to stop by my chambers for just a moment to visit with me. I might possibly want you to visit with

the attorneys involved in this case with regard to your impressions, if you are willing to do so."

(Transcript, Vol. IV, p. 845.)

The trial court could not and did not take judicial notice of whether Juror Johnson was alert or sleeping.

CONCLUSION

At the close of evidence, the respondents requested that Juror Johnson, an engineer and the only college graduate on the jury, be excused. The trial court did so excuse Juror Johnson and it did so without making any finding or record that Juror Johnson was unable or disqualified. This effectively gave respondents a fourth peremptory juror challenge in violation of 28 U.S.C. § 1870 and Rule 47, Fed. R. Civ. P. For these reasons, the Petition For Certiorari should be granted.

July 6, 1992.

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLARK NEWTON and JOYCE NEWTON, Plaintiffs-Appellees, v. ENRITECH, INC., an Illinois corporation; CHALLENGER ELECTRICAL EQUIPMENT CORP., a Delaware corporation and successor corporation to Federal Pacific Electric Company, a/k/a/ FPE; and RELIANCE ELECTRIC INDUSTRIAL COMPANY, and/or RELIANCE ELECTRIC COMPANY, a Delaware corporation and holding corporation for Federal Pacific Electric Company, a Delaware corporation, Defendants, FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation, Defendant-Appellant. COMMERCIAL UNION INSURANCE COMPANY, INC., Intervenor.	Nos. 91-6174 and 91-6276 (D.C. No. CIV-89-1054-W) (W.D. Oklahoma) (Filed Apr. 6, 1992)

ORDER AND JUDGMENT*

Before **Moore** AND **BRORBY,** Circuit Judges, and **HUNTER,** District Judge.**

This appeal arises from a successful manufacturers' product liability diversity action in which Clark Newton was seriously injured while working on an electrical substation manufactured by the Federal Pacific Electric Company (FPE). FPE contends the jury verdict should be reversed because Mr. Newton is not a member of the class of persons protected by the manufacturers' product liability doctrine. FPE also asserts a new trial should be granted because the district court abused its discretion in removing a sleeping juror. Finding no merit in these claims, we affirm.

Mr. Newton was engaged by Oberlin World Press to upgrade the power capacity of an electrical system Oberlin had purchased from FPE. The electrical system is divided into two substations which are connected electrically by a tie switch and a flat metal conductor, or "bus."

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Elmo B. Hunter, United States Senior District Court Judge for the Western District of Missouri, sitting by designation.

Each substation is divided into cubicles numbered one through thirteen, with the tie switch and bus for substation 2 in cubicle number 4. The power upgrade requested by Oberlin required an 800-amp spare switch in cubicle 5 in substation 2 to be replaced by a 1200-amp switch.

Prior to entering cubicle 5, Mr. Newton de-energized substation 2 and assured there was no power in his cubicle. However, because of FPE's unusual system design, the link between the two substations was still "hot" and thus electricity could still enter substation 2. While working in the cubicle, Mr. Newton inadvertently touched a metal bar to the exposed tie bus in the adjacent cubicle and was seriously injured.

Mr. Newton brought an action for his personal injuries in which his wife, Joyce, joined for loss of consortium. In his claim, Mr. Newton alleged the tie switch and bus were negligently designed and thus were unreasonably dangerous to the ordinary electrician.

The jury awarded Clark Newton $1,455,600 and Joyce Newton $250,000. The trial court entered judgment against FPE and subsequently denied FPE's motions for a directed verdict, judgment n.o.v. and for a new trial.

FPE contends the trial court erred in denying its motions for a directed verdict and for judgment n.o.v. We only reverse a trial court's denial of either motion when, after a *de novo* review, we determine that the evidence taken in the light most favorable to the nonmoving party and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Transpower Constructors v. Grand River Dam Auth.*, 805 F.2d 1413, 1416 (10th Cir. 1990).

To establish manufacturers' product liability in Oklahoma, the plaintiff must prove three things. First, plaintiff must prove the product was the cause of the injury. *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974). If some act of the plaintiff caused the injury, rather than the defective product itself, causation is missing and the plaintiff cannot recover. *Kirkland*, 521 P.2d at 1366. Similarly, if the plaintiff is using the product for some purpose for which it was not intended ("abnormal use") and is subsequently injured, causation is lacking. *Id.*

Second, if the action is against the manufacturer, plaintiff must prove the defect existed in the product at the time the product left the manufacturer's possession and control. *Id.* at 1363. Third, plaintiff must prove the defect made the article "unreasonably dangerous" to him or his property. *Id.*

In *Moss v. Polyco, Inc.*, 522 P.2d 622 (Okla. 1974), decided on the same day as *Kirkland*, the Oklahoma Supreme Court recognized the doctrine of manufacturers' product liability should extend to any third person injured as a result of the defect in the product. "A manufacturer who places in commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition." *Moss*, 522 P. 2d at 626 (citations omitted).

FPE argues on appeal Mr. Newton is not within the class of plaintiffs protected by the manufacturers' product liability doctrine. FPE contends the power upgrade

required Mr. Newton to redesign a portion of the substation. Because Mr. Newton was in the process of redesigning or "remanufacturing" the substation, FPE contends he is not a "user or consumer" of the substation and thus is not protected by the manufacturers' product liability doctrine. Thus, FPE asserts there was insufficient evidence for the jury to find Mr. Newton was a user of the substation.

However, upon careful review of the record, we conclude there was sufficient evidence to establish Mr. Newton was not engaged in substantially altering the substation. Not only was there credible testimony that power upgrades are commonplace, but also there was ample evidence establishing no modification or alteration of either the tie bus which caused the injury or cubicle 4, in which the tie bus was located. Given the fact that power upgrades had been performed previously in the Oberlin substation, and that FPE had advertised its substations as flexible for expansion and had even shipped sections to Oberlin equipped for 1200-amp switches, FPE could have reasonably foreseen the occurrence of a power upgrade or the substation.

FPE also moved for a new trial, claiming the trial court improperly replaced juror Johnson with an alternate juror in violation of Fed. R. Civ. P. 47(b). We review the trial court's denial for a "manifest abuse of discretion." *Transpower Constructors v. Grand River,* 905 F.2d at 1417 (citing *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988)).

Rule 47(b) provides that alternate jurors "shall replace jurors who, prior to the time the jury retires to

consider its verdict, become or are found to be unable or disqualified to perform their duties." The controlling question on review is whether the trial court's removal of a juror tended to weaken the institution of the jury trial. *Metropolitan Paving Co. v. International Union of Operating Eng'rs*, 439 F.2d 300, 304 (10th Cir.), *cert. denied*, 404 U.S. 829 (1971). The trial court has considerable discretion in deciding whether jurors are able to perform their duties. *United States v. Ashby*, 864 F.2d 690, 694 (10th Cir. 1988), *cert. denied*, 494 U.S. 1070 (1990).

After both parties had exercised their peremptory challenges, the trial court stated juror Ketcham would be the alternate juror unless, at the end of the case, the parties agreed to substitute another juror as the alternate or unless the court determined that another juror should be substituted as the alternate. During trial, the court observed that juror Johnson was at times inattentive and sleeping. Before instructing the jury, the court asked each party to suggest an alternate juror. When the parties disagreed upon the choice, the court chose juror Johnson as the alternate, based on her inattentiveness during argument.[1]

The conduct of juror Johnson in open court is a matter of which the trial court had judicial knowledge and could take judicial notice. *United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970). There can be little doubt that a juror who sleeps throughout portions of a trial is unable to adequately perform his or her duties and that a

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[1] The court just as easily could have disqualified Ms. Johnson and substituted Ms. Ketcham as the alternate. The difference is a matter of form and not substance.

court's dismissal of that juror is properly within its discretion. *See, e.g., United States v. Cameron*, 464 F.2d 333, 335 (3d Cir. 1972). We have thoroughly examined the record, and we find no basis for setting aside the findings of the trial judge.

AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLARK NEWTON and JOYCE NEWTON,

Plaintiffs – Appellees,

v.

ENERTECH, INC., an Illinois corporation; CHALLENGER ELECTRICAL EQUIPMENT CORP., also known as FPE, a Delaware corporation successor corporation to Federal Pacific Electric Company; RELIANCE ELECTRIC INDUSTRIAL COMPANY AND/OR RELIANCE ELECTRIC COMPANY, a Delaware corporation & holding corporation for Federal Pacific Electric Company, a Delaware corporation, Delaware corporation,

Defendants.

and

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation,

Defendant – Appellant.

COMMERCIAL UNION INSURANCE COMPANY,

Intervenor.

Nos. 90-6174
91-6276

ORDER
Filed May 22, 1992

Before MOORE and BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CLARK NEWTON AND JOYCE NEWTON, Plaintiff, v. ENERTECH, INC., an Illinois corporation; FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation, Defendants.	Docket No. CIV-89-1054-W Oklahoma City, Oklahoma VOLUME I Jury Trial (Filed May 6, 1991)

VOLUME I
TRANSCRIPT OF JURY TRIAL
TUESDAY, JANUARY 15, 1991
BEFORE THE HONORABLE LEE R. WEST
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Court Reporter	Lynn L. Hilton 3013 U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[p. 7] of you know either of the Defendants or the representatives or their attorneys in any way?

(No response).

THE COURT: Do you have any interest or do any business with Enertech or Federal Pacific Electric, which is a corporation? Do you have any ownership or interest in that?

Let me explain one thing right off, the law provides that a corporation is treated, for the purpose of a lawsuit, just as an individual is. They are to be given no preference because they are a corporation. They are not to be mistreated in any way because they are a corporation.

Does the fact that the Defendants are corporations in this case cause any of you any bias or prejudice one way or the other?

(No response).

THE COURT: Could you treat them fairly and impartially, as if they were individual defendants in this case?

(Jurors affirm unanimously.)

THE COURT: Let the record so reflect.

Let me ask you several questions, then. I want to ask you to stand and discuss yourself with us a bit.

Well, how many of you are electricians or have any of you had any training as electricians?

Any members of your family electricians?

[p. 8] Have you had any work in electrical engineering of any particular degree or kind?

(No response.)

THE COURT: I gather not.

You are like – I'm sorry, Cynthia Johnston.

MS. JOHNSTON: I have had an electrical science course in my engineering.

THE COURT: You can determine from the preliminary statement what this lawsuit is about. Would the fact that you have had some training in that regard, would that create any problems or difficulties with you being a fair and impartial juror in this case?

JUROR JOHNSTON: No, sir.

THE COURT: I gather not.

Have any of you or any close member of your family suffered from burns, electrical burns or flash fire burns

resulting from anything of that nature? Any immediate family members?

(No response.)

THE COURT: I gather not.

How many of you have been a party to a lawsuit in which you or some member of your family was injured as a result of the product that you – well, let me back up. I'm saying this poorly.

This is what is known as a manufacturer's product [p. 9] liability case. I'll instruct you at great length at the close of the case, but basically the law is that if someone either designs or constructs a product that is unreasonably dangerous to the user or consuming public, that they are liable for any injuries that they are responsible for resulting from this design defect or construction or if they fail to adequately warn about dangers, they can be held liable.

Now, have any of you been parties, either as a Plaintiff or a Defendant, in such a lawsuit?

(No response.)

THE COURT: I gather not.

Any member of your family, to the best of your knowledge, been involved in a suit against the manufacturer or designer of a product of some kind?

(No response.)

THE COURT: I gather not.

Do you know of any reason why you should not serve as a fair and impartial juror in a case of this kind?

Do any of you have any misgivings about that whatsoever?

(No response.)

THE COURT: Now, I want to call on, we'll start with Cynthia Johnston. Mrs. Johnston, would you please stand, tell us a bit about yourself, where you were born, where you were raised, what your educational background is, what your [p. 10] employment is and what your family and leisure activities involve.

MS. JOHNSTON: I'm Cynthia Johnston, born in St. Louis, Missouri. I'm 29 years old. I live in Midwest City currently. I was raised in St. Louis, and various other places, before coming to Midwest City.

I have a degree in industrial engineering from Oklahoma University. I have a husband, who works at Tinker Air Force Base as a program controller.

I am an industrial engineer there in the facilities at Tinker Air Force.

I have a child who is two-and-a-half years old. I enjoy camping and needlepoint.

THE COURT: Thank you.

Royce Oakley.

JUROR OAKLEY: I'm 29. I have been married for nine years. I have two boys, 8 years old and 4 years old. I live in a town called Prague, east of here.

I drive for an over-the-road trucking company mainly around the Western United States.

I like to play a little golf when I'm home. I like to play Nintendo with my boys. My wife is a school teacher. That's about it.

THE COURT: Linda Neher.

JUROR Neher: I am from Oklahoma City and have been

* * *

[p. 15] would prevent you from rendering damage in the amount that you felt, under the facts and the law, were warranted in this case?

(No response.)

THE COURT: I gather not.

(Discussion at bench, out of the hearing of jury:)

THE COURT: Pass for cause?

MR. NIEMEYER: Yes.

MR. RUPERT: Yes.

THE COURT: Exercise your first preemptory.

MR. NIEMEYER: Glenda Neher.

THE COURT: Your first.

MR. RUPERT: Charles Elrod.

THE COURT: Your second.

MR. NIEMEYER: Elizabeth Chanler.

MR. RUPERT: Mr. Oakley.

THE COURT: Your third and last.

MR. NIEMEYER: Mr. Richards

MR. RUPERT: Mr. Leo Biswell.

THE COURT: Gentlemen, this will be the alternate juror (Court pointing to the card of Juror Ketcham) unless at the end of the case, the parties agree to substitute another juror as the alternate or unless the Court determines that another should be substituted as the alternate.

(Proceedings resumed within jury's hearing:)

* * *

UNITD STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CLARK NEWTON AND JOYCE NEWTON, Plaintiffs, v. ENERTECH, INC., an Illinois corporation; FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation, Defendants.	Docket No. CIV-89-1054-W Oklahoma City, Oklahoma VOLUME IV Jury Trial

VOLUME IV
TRANSCRIPT OF JURY TRIAL
FRIDAY, JANUARY 18, 1991
BEFORE THE HONORABLE LEE R. WEST
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiffs: JOHN C. NIEMEYER and
MICHAEL L. NOLAND
NIEMEYER, NOLAND & ALEXANDER
Attorneys at Law
300 North Walker
Oklahoma City, OK 73102

For the Defendant FPE: ANTON J. RUPERT
Attorney at Law
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102

For the Defendant Enertech:	JOHN J. LOVE and ROBERT MURPHY Attorney at Law 11th Floor Colcord Building Oklahoma City, OK 73102
Court Reporter	Lynn L. Hilton 3013 U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[p. 844] as an action between persons of equal standing in the community and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice."

That will be included in the instructions submitted.

(Discussion at bench, out of the hearing of jury:)

THE COURT: Do you both agree to the verdict forms? Are the verdict forms satisfactory?

MR. NIEMEYER: No objection.

MR. RUPERT: No objection

MR. LOVE: No objection.

THE COURT: Let me have your slips with regard to the alternate juror.

(Counsel hand the Court a piece of paper with the name of their request for the alternate juror. Following which:)

THE COURT: I am going to excuse her.

(Proceedings resume within the hearing of the jury:)

THE COURT: Would the bailiff stand and be sworn.

(Whereupon, Bailiff is sworn:)

THE COURT: Ladies and gentlemen of the jury, I'll pass a copy of my instructions, together with two verdict forms. My bailiff will hand them to one of you at random as [p. 845] you go down to begin your deliberations, just as you go into the jury deliberation room. Then you may select your foreperson. Whoever is the foreperson, will then take charge of the instructions and the verdict forms.

Cynthia Johnson, you are the alternate juror in this case, so if you will remain in the courtroom until after the other jurors begin their deliberations, I'll excuse you at that time.

Now, I don't ordinarily submit any of the documents to the jurors, any of the exhibits that are admitted, unless and until they are requested by the jury. If you feel the need to examine any of them, all you have to do is notify the Court and we'll submit them at that time.

I'll ask everyone to please stand and the jurors will accompany my bailiff. Ladies and gentlemen of the jury, we'll await your verdict in this case.

(Jury retires to begin its deliberations at 2:30 p.m.)

THE COURT: Ms. Johnson, I want to thank you for your willingness to serve as a juror in this case. You are now excused, because we have six jurors to try the case.

As I say, you are now free to discuss it; you are under no obligation. I would like for you to stop by my chambers for just a moment to visit with me. I might possibly want you to visit with the attorneys involved in this case with regard to your impressions, if you are willing to do so.

[p. 846] JUROR JOHNSON: Sure.

THE COURT: Go out that way.

* * *

(2)

Supreme Court, U.S.
FILED
AUG 5 1992
OFFICE OF THE CLERK

No. 92-55

In The

Supreme Court of the United States

October Term, 1992

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware Corporation,

Petitioner,

vs.

CLARK NEWTON and JOYCE NEWTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 92-55

In The

Supreme Court of the United States

October Term, 1992

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware Corporation,

Petitioner,

vs.

CLARK NEWTON and JOYCE NEWTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Clark Newton and Joyce Newton submit the following brief in opposition to Federal Pacific Electric Company's petition for review under writ of certiorari.

STATEMENT OF THE CASE

The following additional facts are material to consideration of the questions presented.

Federal Pacific Electric Company ("Federal Pacific") omits the explanation for the procedure through which Juror Nancy Ketcham was substituted for Juror Cynthia Johnson. Federal Pacific's omission is of particular importance because this procedure was arranged by the court in response to complaints by respondents' counsel that Juror Johnson slept throughout the trial.

Standing alone, the transcript excerpt of the bench conference quoted by Federal Pacific at page 4 is not sufficiently revealing. Placed in context and supplemented by Court Exhibit No. 1, however, the purpose of the procedure becomes clearer.

During the course of trial, respondents complained that one of the jurors was sleeping during the trial. The court reserved ruling on the complaint. The court, in chambers, made arrangement with the parties to suggest the name of a juror to be designated as alternate prior to submitting the case for consideration. The sole purpose for arranging this procedure was to allow the court and counsel to observe the jury. Federal Pacific did not object to the procedure. *See generally,* Appendix A, 1a-2a, *infra*.

Immediately prior to submission of the case, as previously agreed by the parties, the court conducted the bench conference to select an alternate juror. Although the procedure utilized written submissions, it was conducted in the presence of attorneys for *both* the Newtons and Federal Pacific.[1] Federal Pacific participated

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1. During the oral arguments presented in the appeal of this matter, counsel (Cont'd)

in the process without inquiry or objection.

Respondents again lodged their complaint against Juror Johnson by submitting the following request *in the presence of Federal Pacific's counsel:*

> Judge West,
>
> The Plaintiff would ask that Juror Cynthia Johnston [*sic*], who slept through most of the trial, be excused.
>
> Mike Noland

In response, the trial judge, *in the presence of Federal Pacific's counsel,* indicated his finding in writing:

> *I agree.* LRW.

This written finding was made a part of the record as court Exhibit No. 1. *See* Appendix B, 3a.[2] The trial judge then stated, *again*

(Cont'd)
for Federal Pacific admitted to the court that the exchange of names, although written, was conducted in his presence. If he could not see the names, or did not understand the procedure, he merely needed to inquire. In this regard, Federal Pacific's assertion that the procedure was somehow "*ex parte*" is patently frivolous.

2. At oral arguments on appeal, the court inquired of Federal Pacific's counsel why this written acknowledgment by the trial judge that Cynthia Johnson had been sleeping does not constitute a "finding". Federal Pacific's counsel had no response.

In its petition for rehearing, Federal Pacific again urged that the replacement procedure was conducted "*ex parte*" and that the trial judge never made a (Cont'd)

in the presence of Federal Pacific's counsel, that he would excuse her.

The court substituted Juror Ketcham and the jury retired to deliberate. Federal Pacific made no objection, either during the substitution conference or at any time thereafter. Not even during the deliberations nor during the verdict's return did Federal Pacific object to Juror Johnson's removal. Federal Pacific sat idly by. The allegation of error was first invented by Federal Pacific during post-trial motions.

SUMMARY OF THE ARGUMENT

Federal Pacific asserts that the procedure implemented by the trial court effectively granted the respondents an additional peremptory challenge. While this argument might have some merit had the court merely chosen one party's suggestion over the other's, the record shows clearly that Juror Johnson was dismissed for cause. The fact that a party initiated the complaint which led to the juror's dismissal for cause does not convert the suggestion to a peremptory challenge.

(Cont'd)

"finding". Federal Pacific suggested that the Court of Appeals had overlooked these arguments (essentially the same arguments presented herein). In light of the admissions made by Federal Pacific's counsel at oral argument, the Newtons viewed the petition as frivolous and sought sanctions. Although the court stopped short of imposing sanctions, the court's response was not surprising:

> Although the court believes the issue raised in the petition for rehearing was fatuous, and thus ignored rather than overlooked it in the first instance, we do not conclude it was of the nature to prompt sanctions.

App. at 6a.

Federal Pacific's other argument centers around its continued insistence that the court failed to make a finding that Juror Johnson was sleeping and that Federal Pacific was somehow left out of the procedure which led to her replacement. The record at the district court level, coupled with admissions by Federal Pacific's counsel at oral argument, puts this contention to rest.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT GRANT RESPONDENTS AN ADDITIONAL PEREMPTORY CHALLENGE; THE COURT DISMISSED JUROR JOHNSON FOR CAUSE.

The Court of Appeals recognized that the standard to be applied in reviewing a trial court's decision to remove a juror who becomes unable to perform her duties and substitute an alternate juror is abuse of discretion. *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979); *See also, United States v. Cameron*, 464 F.2d 333, 335 (3rd Cir. 1972) (dealing with Fed. R. Crim. P. 24(c), counterpart to Fed. R. Civ. P. 47(b)); *United States v. Ashby*, 864 F.2d 690, 694 (10th Cir. 1988) (trial court has "considerable discretion" in deciding whether jurors are able to perform their duties without prejudice or bias).

During the course of proceedings the Newtons' counsel called the trial judge's attention to the fact that juror Cynthia Johnson had been sleeping during trial. Parties have a duty to advise the court of such conduct. *United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970); *United States v. Peters*, 713 F. Supp. 1246, 1252 (C.D. Ill. 1989). Upon receiving the complaint, the trial judge advised the parties that he would observe the juror and asked

the parties to do the same.[3]

Although the Newtons lodged the complaint concerning Juror Johnson's conduct, *the trial judge himself* ultimately determined that Johnson indeed had been sleeping. The trial judge's prior attempt to solicit input from counsel on whether to replace Johnson does not alter the result. Johnson's removal did not result from the exercise of a peremptory challenge.

Guided by the decisions which have dealt with the issue, there can be little doubt that a juror who sleeps throughout the trial is unable to adequately perform his or her duties and that a court's dismissal of that juror is properly within its discretion. *See, e.g., United States v. Warner,* 690 F.2d 545, 555 (6th Cir. 1982); *United States v. Smith,* 550 F.2d 277, 285 (5th Cir. 1977); *United States v. Cameron,* 464 F.2d 333, 335 (3rd Cir. 1972). The dismissal was consistent with the well-established rule among the circuits.

II.

THE TRIAL COURT PROPERLY TOOK NOTICE OF JUROR JOHNSON'S CONDUCT AND MADE THE APPROPRIATE FINDING.

The court gave the parties an opportunity to make a final recommendation concerning the sleeping juror. The courtesy, however, was not required. *United States v. Carter,* 433 F.2d 874, 876 (10th Cir. 1970) (conduct of a juror in open court is a matter of which the trial court may take judicial notice); *United States*

---

3. Federal Pacific suggests that the substitution procedure effectively granted the respondents an additional peremptory challenge. Of course, the jury had already been selected, including the alternate. The proceedings Federal Pacific now challenges had nothing to do with *picking* the jury in the first instance. Rather, the process addressed the *substitution* of a juror for cause.

v. Fajardo, 787 F.2d 1523, 1526 (11th Cir. 1986) (trial judge does not need counsel's consent to replace a juror with an alternate; only a reasonable cause for the replacement).

Federal Pacific asserts that Fed. R. Evid. 201 limits a court's power to take notice of the conduct of jurors during proceedings. Yet Federal Pacific neither cites any decisional authority supporting its position nor explains how the plain language of that rule imposes such proscription. Certainly, the Tenth Circuit's decision in *Carter* holds otherwise.

Interestingly, Rule 201 does permit Federal Pacific an opportunity to be heard as to the propriety of taking judicial notice, even *after* notice has been taken. This notwithstanding, Federal Pacific lodged no objection to the procedure, even after Juror Johnson was dismissed. *See United States v. Warner*, 690 F.2d 545, 555 (6th Cir. 1982) (placing significance on counsel's failure to object to the procedure which resulted in dismissing a sleeping juror). Only after an adverse verdict, did Federal Pacific cry foul.

Federal Pacific relies heavily on *United States v. Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983), for the proposition that a court must conduct a formal hearing into allegations of juror misconduct. Federal Pacific reads too much into *Barrett* (a case first cited on appeal by the Newtons, not Federal Pacific).

The *Barrett* court reversed the judgment because the trial court refused to adequately investigate and replace a juror who, admittedly, had been sleeping. Here, however, the trial judge acted on the complaint and ultimately removed the juror. The Tenth Circuit's affirmance in this case does not conflict with *Barrett*.

The Tenth Circuit ruling below is consistent with the criteria established in virtually every circuit which has considered the

question: Absent a complete lack of factual basis for the substitution, the decision will not be disturbed.

III.

THE PROCEDURE OF WHICH FEDERAL PACIFIC COMPLAINS DID NOT RESULT IN PREJUDICE TO FEDERAL PACIFIC.

Although Federal Pacific does not argue expressly that the juror replacement procedure was prejudicial, that position is implied at page 5 where the juror's educational background is summarized. To the extent that Federal Pacific intimates Juror Johnson's presence would have altered the result, the contention provides no legal basis for relief.

The Tenth Circuit's affirmance followed the established rule that "an interested party to a lawsuit has no vested right in any particular juror." *Metropolitan Paving Co. v. Int'l Union of Operating Eng'rs*, 439 F.2d 300, 304-05 (10th Cir. 1971) (*citing United States v. Chapman*, 158 F.2d 417 (10th Cir. 1947)). A party's right is limited to challenging *unqualified* jurors.

Juror Johnson had slept through the proceedings. She had yet to deliberate with the other jurors. Federal Pacific's assumption that any inclination Johnson might carry into the jury room would not only survive the deliberations intact, but persuade all the other jurors as well, is nothing more than pure speculation. Such speculation is insufficient to warrant corrective relief. *United States v. Rodriguez*, 473 F.2d 330, 332-33 (1978).

Moreover, any prejudice argument would be misplaced. The type of prejudice from juror replacement which warrants reversal should arise out of the substitution procedure itself and should focus on the effect the *procedure* had on the remaining jurors.

The record is devoid of any showing that the remaining jurors suffered any bias or prejudice as a result of the manner in which Johnson was replaced. The trial court accomplished the substitution without attention to the circumstances or embarrassment to any juror. The substitution was completed prior to the beginning of any deliberations. The procedure was harmless.

CONCLUSION

A juror who sleeps through the proceedings cannot be expected to perform her duties. The Tenth Circuit, consistent with the criteria applied in virtually every circuit, properly recognized that the trial judge had not abused his discretion in replacing Juror Johnson for cause.

For the foregoing reasons, Federal Pacific's petition for writ of certiorari should be denied.

Dated: August 5, 1992.

Respectfully submitted,

KENNETH D. UPTON, JR.
Counsel of Record
JOHN C. NIEMEYER
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NIEMEYER, NOLAND & ALEXANDER
Attorneys for Respondents Clark Newton and Joyce Newton

APPENDIX A — EXCERPT FROM TRIAL COURT ORDER FILED MARCH 25, 1991 (DOC. NO. 148)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-1054-W

CLARK NEWTON and JOYCE NEWTON,

Plaintiffs,

vs.

ENERTECH, INC., an Illinois corporation; and FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation,

Defendants,

ORDER

* * *

[p. 3]: In chambers, the Court recalls arranging with the parties to submit a name of a juror to be selected as the alternate in the trial. No objection was made by either side.

This procedure was arranged because Plaintiff's counsel complained that the juror Cynthia Johnson was sleeping during trial. The Court reserved ruling on that matter and arranged the procedure in order to allow both sides to observe the jury, contemplating the possibility that the parties would agree that Cynthia Johnson was inattentive or sleeping. Returning to trial, the Court recalls observing that Cynthia Johnson was inattentive and sleeping during trial. Therefore, upon receiving Plaintiff's

slip which indicated a desire to designate Cynthia Johnson as the alternate because she had been sleeping, the Court agreed and indicated its finding by writing "I agree" on Plaintiff's slip and initialing thereunder. *See* Court file, docket number 134. Accordingly, the Court finds no prejudice to the Defendant FPE or weakening of the jury system by eliminating an inattentive and sleeping juror.

APPENDIX B — EXCERPT FROM COURT'S EXHIBIT NO. 1 FILED JANUARY 18, 1991 (DOC. NO. 134)

(Omitted Here But Submitted Separately As "Lodging Appendix")

APPENDIX C — TENTH CIRCUIT ORDER FILED MAY 19, 1992

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 91-6174

91-6276

CLARK NEWTON and JOYCE NEWTON,
Plaintiffs-Appellees,

v.

ENERTECH, INC., an Illinois corporation; CHALLENGER ELECTRICAL EQUIPMENT CORP., also known as FPE, a Delaware corporation Pacific Electric Company; RELIANCE ELECTRIC INDUSTRIAL COMPANY AND/OR RELIANCE ELECTRIC COMPANY, a Delaware corporation & holding corporation for Federal Pacific Electric Company, a Delaware corporation,

Defendants.

and

FEDERAL PACIFIC ELECTRIC COMPANY, a Delaware corporation,

Defendant-Appellant.

COMMERCIAL UNION INSURANCE COMPANY,
Intervenor.

ORDER
Filed May 19, 1992

Appendix C

Before MOORE and BRORBY, Circuit Judges.

Although the court believes the issue raised in the petition for rehearing was fatuous, and thus ignored rather than overlooked it in the first instance, we do not conclude it was of the nature to prompt sanctions. Accordingly, the motion for sanctions is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

s/ Patrick Fisher
By: PATRICK FISHER
Chief Deputy Clerk